[redacted], SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

[redacted] STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AND PUBLIC CITIZEN

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QUESTIONS PRESENTED

1. Does the Paperwork Reduction Act, in authorizing the Office of Management and Budget to review Federal Agency "information collection requests", empower the Office to review substantive regulations requiring one private party to provide information to another private party for the latter's use and protection?

2. Did the Office of Management and Budget, in countermanding regulations issued by the Occupational Safety and Health Administration requiring employers to provide employees with information concerning chemical hazards in the workplace, exceed its statutory authority under the Paperwork Reduction Act, which requires the Office to exercise its authority "consistent with applicable law," and which states that the Act shall not be interpreted as increasing the Office's authority with respect to the "substantive policies and programs" entrusted to other agencies?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AND PUBLIC CITIZEN

STATUTES INVOLVED

In addition to the sections of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, that are reproduced in the Addendum to the Brief for the Petitioners, this case involves the following additional sections of that Act:

Section 3501(6):

> The purpose of this chapter is:
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> • • • •
>
> (6) to ensure that the collection, maintenance, use and dissemination of information by the

Federal Government is consistent with applicable laws relating to confidentiality, including section 552a of title 5, United States Code, known as the Privacy Act.

Section 3507(f):

An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request.

Section 3512:

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

The case also involves the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, and particularly §§ 6(b)(5) & 6(b)(7), 29 U.S.C. § 655(b)(5) & (7). Those sections provide in pertinent part as follows:

Section 6(b)(5):

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data

in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Section 6(b)(7):

Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

* * * *

The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

STATEMENT

A. History and Provisions of the Hazard Communication Standard

In November 1983 the Occupational Safety and Health Administration ("OSHA" or "the Agency") promulgated a Hazard Communication Standard ("the Standard" or "HCS"). The Standard is based on OSHA's determination that one of the prime causes of occupational illness and injury is that employees lack knowledge regarding the chemical hazards they confront on the job. *See* 48 Fed. Reg. 53282-84, 53321 (1983); 52 Fed. Reg. 31852, 31868-69 (1987).

The 1983 Standard requires chemical manufacturers to evaluate chemicals they produce to determine if the chemicals are hazardous. 29 C.F.R. § 1910.1200(d)(1) (App. 18).[1] For each chemical determined to be hazardous, the chemical manufacturer must develop a material safety data sheet ("MSDS") and provide the MSDS to employers who use the chemical in their business, § 1910.1200(g)(1)(6) (App. 24, 27); and containers of hazardous chemicals must be labeled by the manufacturer with the chemical's identity and appropriate hazard warnings. § 1910.1200(f)(1) (App. 22).[2]

With respect to so-called "downstream" employers—*viz.*, employers other than chemical manufacturers—the standard imposes much less extensive obligations. Those employers are required in essence to transmit to their employees the information already produced and compiled by the chemical manufacturers. Thus, these employers must (i) maintain copies of the MSDSs they receive, and make the MSDSs accessible to employees at the worksite, § 1910.1200(g)(8) (App. 28); (ii) see to it that containers of hazardous chemicals in the workplace are labeled with information corresponding to that provided

[1] Some of the requirements applicable to chemical manufacturers also apply to chemical importers and distributors. For simplicity we refer to all such entities as "chemical manufacturers."

[2] A material safety data sheet must disclose the identity of the hazardous chemical; important physical and chemical characteristics such as vapor pressure or flash point; the physical hazards of the chemical, including the potential for fire, explosion, and reactivity; the health hazards, including signs and symptoms of exposure, and any medical conditions that are aggravated by exposure; the primary route(s) of entry into the body; applicable exposure limits; whether the chemical is listed on certain published indices of carcinogens and potential carcinogens; any generally applicable precautions for safe use; any generally accepted control measures; emergency and first aid procedures; and the name, address and telephone number of the party who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary. § 1910.1200(g)(2) (App. 24-26).

on the labels arriving from the chemical manufacturers, § 1910.1200(f)(5) (App. 23); (iii) provide employees with information and training on hazardous chemicals, § 1910.1200(h) (App. 29); and (iv) develop and maintain a written hazard communication program that describes how the employer will meet the requirements described above, § 1910.1200(e)(1) (App. 21).

The Office of Management and Budget (OMB), purporting to act under the authority of the Paperwork Reduction Act (PRA), reviewed the provisions of the 1983 Standard and approved that Standard without exception. *See* 48 Fed. Reg. 53280 (1983) (App. 39).

The 1983 Standard covered only chemical manufacturers, and employers in the manufacturing sector of the economy as defined by Standard Industrial Classification (SIC) Codes 20 through 39. On petitions for review of that Standard filed in the Third Circuit, that court held, *inter alia*, that OSHA lacked a legally adequate rationale for confining the Standard to the manufacturing sector, and OSHA was directed "to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless [it] can state reasons why such application would not be feasible." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 739 (3d Cir. 1985) (*"USWA I"*). When OSHA delayed in carrying out that mandate, the Third Circuit issued a second decision directing the Agency to act on the basis of the original rulemaking record and to complete its reconsideration within sixty additional days. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) (*USWA II*).

Subsequently, on August 24, 1987, OSHA promulgated the revised Hazard Communication Standard, extending the coverage of the HCS to all employers covered by the OSH Act. 52 Fed. Reg. 31852-86 (1987). With three modifications that are pertinent here, the substantive provisions of the revised Standard are the same as those of

the 1983 Standard approved by OMB; all the other original provisions apply now to all employers, rather than only those engaged in manufacturing.

The three modifications are as follows.

First, the revised Standard includes a new provision dealing with multi-employer worksites, which provides that if circumstances are such that the employees of one employer may be exposed to hazardous chemicals produced, used or stored by another employer on the site, the latter must either provide copies of the MSDSs for those chemicals to the other employer, "or . . . make [the MSDSs] available at a central location in the workplace." § 1910.1200(e)(2) (App. 21-22).[3]

Second, OSHA added a provision exempting from the coverage of the HCS any drug that is "in solid, final form

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[3] OSHA did not prescribe any specific procedure for accomplishing the required exchange of MSDSs, stating that "[c]onsistent with the performance-orientation of the rule . . . [t]his is . . . left to the discretion of the [employers]." 52 Fed. Reg. 31865 (1987) (App. 47). "For example, the general contractor could keep and make available [MSDS] in the office on the site." *Id.* Adding that the multi-employer worksite provision "will help ensure that all employees have sufficient information to protect themselves in the workplace, regardless of which employer uses the hazardous chemical," *id.*, the Agency explained the scope and purpose of the provision as follows:

> It should be emphasized that the exchange of information is limited to those situations where exposures of other employers' employees may occur. Given the nature of multi-employer work sites in construction, there would be many situations where subcontractors responsible for various phases of the building project would not have employees present during other phases and thus no such exchange would be required. For example, if the electricians are not working near, or at the same time as, the paving contractor, then no interchange is required. But if a painting contractor's workers are using flammable solvents in an area where another subcontractor is welding pipes, this information exchange is vital to ensure proper protection of employees. [*Id.*]

for direct administration to the patient." § 1910.1200(b)(6)(viii) (App. 11-12).[4]

Third, OSHA added an exclusion for any "consumer product," as defined in the Consumer Product Safety Act, "where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers." § 1910.1200(b)(6)(vii) (App. 11)[5]

We note that in addition to the two exemptions just described, which apply to all provisions of the HCS,

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[4] OSHA explained that "[e]mployees handling such finished drug products would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements." 52 Fed. Reg. 31863 (App. 45).

[5] OSHA explained why this exception should apply only where the product is used in such a way that worker exposure will be comparable to normal consumer exposure:

> One example of such a differentiation in exposure situations involves the use of abrasive cleaners in the workplace. Where these are used intermittently to clean a sink, such as they would be used at home, the cleaners would not be covered under the standard. But if they are used to clean out reactor vessels, thus resulting in a much greater level of exposure, they would be covered. Or if an employee cleans sinks all day long, thus resulting in more frequent exposures, the abrasive would also be included in the hazard communication program.
>
> • • • •
>
> The key elements of concern to OSHA are as stated in the consumer product exemption included in this rule—that the consumer product be used in the same manner as a consumer would use it (and therefore as intended by the manufacturer when preparing the label information), and that the duration and frequency of exposure be essentially the same as would be experienced by a consumer (and thus the label warnings would provide adequate protection.) A broader exemption than this would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed. [52 Fed. Reg. 31862, 31863 (App. 43, 45).]

OSHA also exempted from the *labeling* provisions all FDA regulated drugs, whether or not in "solid, final form," and all consumer products that are subject to requirements under the Consumer Product Safety Act, regardless of how the products are used in the workplace. § 1910.1200(b)(5)(ii), (iv) (App. 10-12).

B. OMB's Disapproval of Three Provisions of the Revised Standard

On September 10, 1987, OSHA submitted the revised Standard to OMB for review, and, on October 23, OMB, exercising its purported authority under the PRA, disapproved the three new provisions just described.

With respect to the provision requiring employers at multi-employer worksites to exchange MSDSs in certain circumstances, OMB devoted most of its discussion to comments that had been made by industry groups regarding the alleged difficulty of complying with this provision, *see* Pet. App. 30a-32a, including, for example, a complaint that "a minimum of several file cabinets would be required . . . ." Pet. App. 32a. OMB asserted that OSHA had not "demonstrate[d] the practical utility for th[is] requirement," *id.*, and opined that "the requirement does not appear to be the least burdensome necessary for the efficient transmittal of hazard information in multi-employer workplaces." *Id.*[6]

[6] It appears that OMB intended by its disapproval to exempt employers at multi-employer worksites not only from the obligation contained in § 1910.1200(e)(2) to make MSDSs available to *other employers*, but also from the obligation imposed on every employer by § 1910.1200(g)(8) to make MSDSs "readily accessible" to the employer's *own employees* "when [the employees] are in their work area(s)." Although OMB actually disapproved only the former provision, OMB characterized its disapproval as applying to "the requirement that material safety data sheets be provided on multi-employer worksites." Pet. App. 25a, 43a. *See also* Pet. App. 32a ("the requirement to bring MSDSs onto multi-employer worksites is disapproved"). Petitioners' brief is ambiguous on this point. See Pet. Br. at 12. *But see* Brief of Respondents Associated Builders and Contractors, Inc. ["ABC"] and the Construction Industry Trade Associations at 5 and n.4. If, as ABC appears to suggest, OMB's disapproval was intended to exempt employers at multi-employer worksites from having to make MSDSs available to their *own employees* on site, then OMB inexplicably extended to those employers an exemption that does not apply to any other category of employers.

With respect to the exclusion of certain drugs, OMB's objection related only to employers "[o]utside the manufacturing sector." Pet. App. 37a. As to those employers, OMB asserted that OSHA "does not explain why all drugs regulated by the FDA are not exempted . . ., *id.*; and OMB expressed the view that "coverage of any FDA-regulated drug would result in duplicative paperwork and is unlikely to provide additional information of any practical utility," *id.*

With respect to consumer products, OMB declared it was not enough for OSHA to exclude from the HCS products that are used in the workplace in the same manner, and with the same duration and frequency of exposure, as the products are used by consumers; OMB insisted that OSHA should "exempt any substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product.*" Pet. App. 36a (emphasis added). OMB justified its approach largely on the ground that it would simplify the compliance tasks of employers. Pet. App. 34a-36a.

In the wake of OMB's action USWA and Public Citizen, Inc. filed in the Third Circuit a "Motion for Further Relief With Respect to Prior Decisions of This Court," urging that the Secretary of Labor and the Director of OMB be "enjoin[ed] . . . from taking any further action in derogation of the [Third Circuit's] orders in [*USWA I* and *II*]," and urging that the Secretary and the Director be held in civil contempt.

C. OSHA's Rejection of OMB's Conclusions

While that motion was *sub judice* OSHA published a Notice of Proposed Rulemaking in which, *inter alia*, the Agency solicited public comment on OMB's critique of the three provisions of the HCS at issue. *See* 53 Fed. Reg. 29822-56 (1988) (App. 49-103). Without explicitly rejecting OMB's views, OSHA explained in detail the justifications for each of the three provisions OMB had disapproved, and proposed that the provisions be retained intact notwithstanding OMB's views. However, OSHA stated that by operation of the Paperwork Reduction Act, "the provisions disapproved by OMB will be neither effective nor enforceable until OSHA completes this rulemaking." 53 Fed. Reg. 29826 (App. 64).

With respect to multi-employer worksites, OSHA noted that several participants in the rulemaking, including several construction industry employer associations, had emphasized the importance and feasibility of making MSDSs available at the workplace for *all* hazardous chemicals to which an employee may be exposed, whether the chemical is brought to the site by his own employer or by another employer. *Id.* at 29843-44 (App. 90-96). The Agency further noted that its Advisory Committee on Construction Safety and Health had reviewed the multi-employer worksite provision as promulgated by OSHA, and had raised no objections to "the provision for MSDSs to be made available on multi-employer worksites." *Id.* at 29844 (App. 95). OSHA stated that the Agency "still believes that the multi-employer worksite provision is critical to the proper functioning of the rule, and that MSDSs are necessary to ensure that proper information is available to both employers and employees." *Id.* at 29845 (App. 101).[7] However, OSHA invited further

[7] Although OMB had suggested that labels and training could substitute for MSDSs, *see* Pet. App. 32a, OSHA cited testimony establishing that such is not the case. *Id.* at 29844 (App. 96-98). "The consensus of the participants in the rulemaking on the

comment on this issue and on "OMB's suggested approach." *Id.* at 29845 (App. 102).

With respect to the scope of the exclusion of drugs, OSHA noted that the exclusion the Agency had fashioned (covering all drugs in solid form) is quite broad, *id.* at 29838-39 (App. 85-86), and that other drugs were not excluded "in recognition of the fact that there are various types of workers who may be exposed to drugs in hospitals or pharmacies," and "since drugs are designed to be biologically active, OSHA wants to ensure that employees will be properly protected," *id.* at 29839 (App. 86). OSHA cited recent experience reported by the American Industrial Hygiene Association confirming that exposure of health care employees to drugs that are not in solid form can indeed cause serious occupational health problems. *Id.* Accordingly, although OSHA proposed one modification of the provisions of the Standard with respect to drugs,[8] the Agency did not propose to adopt OMB's approach of "totally exempting all drugs from any coverage under the rule in terms of the non-manufacturing sector workplaces," but did invite comment on this suggestion. *Id.* at 29839 (App. 89).

With respect to consumer products, OSHA explained in detail (i) that the labels and inserts provided with consumer products generally do not include the kind of hazard information that is needed when the product is

original final rule was that labels can only provide limited information—the detailed source of information must be the MSDS. Furthermore, adequate training cannot be conducted if the information is not available on the substances involved." *Id.* at 29844 (App. 97). OSHA found this to be as true in the non-manufacturing sector as in manufacturing. *Id.* at 29844 (App. 98).

[8] The proposal would allow certain FDA-approved documents to be considered MSDSs for purposes of the HCS. *Id.* at 29839 (App. 88).

used in an occupational setting,[9] and (ii) that so-called "consumer products" are responsible for an extremely large number of occupational illnesses and injuries. *Id.* at 29834-35 (App. 66-71). The Agency observed that the rulemaking record had conclusively established those points. *Id.* at 29835-36 (App. 71-77). OSHA reiterated that this is the reason the Standard provides an exemption "tied to type and extent of exposure," which "strikes a balance between the practical considerations of acquiring and maintaining material safety data sheets on CPSC regulated products . . . and the worker's need for more hazard information than a CPSC label when exposures are greater or more frequent than typical public use of the chemical would generate." *Id.* at 29835-36 (App. 77), quoting 52 Fed. Reg. 31863.[10] OSHA therefore did not propose any change in the consumer product exemption as originally promulgated, but again invited comment on OMB's contrary view. 53 Fed. Reg. 29838 (App. 84-85).

[9] "Of particular concern is that the CPSC label is designed to protect consumers under normal conditions of consumer use, or reasonably foreseen misuse, and is frequently directed towards protection of children unintentionally exposed in the home, rather than being directed towards protection of workers exposed repeatedly, and to potentially large concentrations of the material." *Id.* at 29835 (App. 71).

[10] The Agency noted that notwithstanding the inadequacy of CPSC labels in this context (*see supra* note 9), OSHA had decided in promulgating the HCS "to permit the CUSC labels to suffice [for purposes of the *labeling* requirements of the HCS] so as not to disrupt the extensive labeling conducted in accordance with [CPSC] rules," *id.* at 29834 (App. 68); and that this exemption from the labeling requirements applies regardless of how a product is used in the workplace. But precisely because CPSC labels do not provide the kind of hazard information that is needed in the occupational setting, OSHA refused to exempt consumer products from the *other* provisions of the HCS (*i.e.*, training and MSDSs), except where the product is used in such a way that employee exposure may be expected to be comparable to normal consumer exposure. *Id.*; *see also id.* at 29835 (App. 71-73).

D. The Decision Below

Thereafter, on August 19, 1988, the Third Circuit granted USWA and Public Citizens's motion for further relief in part, holding that "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with [the Third Circuit's] orders [in *USWA I* and *II*]," Pet. App. 12a-13a, and directing the Secretary to publish forthwith a notice that the three provisions disapproved by OMB "are now effective," Pet. App. 13a. That court declined, however, to hold the agency officials in contempt. *Id.*

In its opinion the Third Circuit determined that OMB's action is not justified by the PRA. In reaching that result that court relied on two independent grounds: *first*, that the provisions of the HCS at issue do not constitute a "collection of information" within the meaning of 44 U.S.C. §§ 3504(c)(1) & (2), and, therefore, are not subject to OMB review and approval; and *second*, that OMB's action is foreclosed by 44 U.S.C. § 3518(e), which provides that the PRA does not increase OMB's authority "with respect to the substantive policies and programs of . . . agencies . . .," and 44 U.S.C. § 3504(a), which provides that OMB's authority "shall be exercised consistent with applicable law." *See* Pet. App. 8a-11a.

SUMMARY OF ARGUMENT

I. (a) The language and structure of the Paperwork Reduction Act are instinct with the understanding that the sole subject covered by the PRA is Federal agency directives to private parties to provide information *to the agency for the agency's use.*

The section setting forth the statutory purposes, for example, is concerned with eliminating the Federal paperwork "burden," which is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*," 44 U.S.C. § 3501(1); and with maximizing the usefulness and minimizing the

cost of collecting information *"to the Federal Government"*, 44 U.S.C. §§ 3501(2) & (3). In keeping with these purposes, the provisions of the PRA that set forth the agency actions required as a condition of making an information collection request require that an agency making such a request reduce the burden on "persons who will provide information *to the agency*." 44 U.S.C. § 3507(a)(1)(B). So too, the Director of the Office of Management and Budget in determining whether an information collection request is to be approved is instructed to consider whether the information will have "practical utility," 44 U.S.C. § 3504(c); and "practical utility" is defined as *"the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion,"* 44 U.S.C. § 3502(16). In addition, if OMB disapproves an agency's proposed collection of information, the consequence is that "no person shall be subject to any penalty for failing to maintain or provide information *to any agency* . . . ." 44 U.S.C. § 3512.

The legislative history, as well, refers throughout to a Congressional decision "to reduce and minimize the public burden involved in providing information *to the Federal Government*," S. Rep. No. 930, 96th Cong., 2nd Sess. 39 (1980), and says nothing to suggest that OMB's charge extends to substantive requirements that one private party provide information to another private party for the latter's protection.

(b) The definitions of "collection of information" and "information collection request," upon which petitioners place their reliance, do not lead to a contrary conclusion. Those definitions cover "the obtaining or soliciting of facts or opinions *by an agency*," through enumerated methods that correspond to the ways in which the Government customarily demands information for its own use. 44 U.S.C. § 3502(4). This is true of all the information collection methods cited in the definition, including "reporting or recordkeeping requirements"; as the legislative history reflects, such requirements cover information that a party must prepare *for* the Government's use (even if the information need not be provided to the Government except upon *request*).

Nor do the statements in the legislative history discussing information required by the Securities Exchange Commission refer to anything but information which is *filed with the SEC* and *used by the SEC*, both as a basis for disclosures to the public and for enforcement purposes.

In sum, the sole problem that was presented to Congress for resolution in the PRA was that of the Government's burgeoning demands for information to be provided to the Government for the Government's own use, and the provisions Congress enacted only go so far as to grant OMB authority to address that problem.

(c) OMB's attempt, through regulations, to seize an authority that was not conferred upon the Office by Congress does not change the proper statutory analysis. The question whether the "area of regulation" over which an agency claims authority is one "which Congress ha[s] not committed to it" is uniquely one for the *courts* to decide, and not one on which deference is owed to the agency. *Labor Board v. Insurance Agents*, 361 U.S. 477, 499 (1960). "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison v. Holly Hill Fruit Products Co.*, 322 U.S. 607, 616 (1944).

Moreover, the PRA by its terms does not delegate to OMB the power to define the extent of OMB's own authority, but only to "promulgate rules, regulations, or procedures necessary to exercise the authority provided

by [the PRA]", 44 U.S.C. § 3516; a formulation that plainly refers to the authority provided *in fact* by the PRA, not whatever authority OMB desires to exercise.

II. Even if the provisions at issue here were subject to OMB review, OMB's action invalidating those provisions is still contrary to law. In this case, OMB failed to respect the limits on the Office's authority that Congress drew in PRA § 3504(a), which provides that OMB must exercise its authority "consistent with applicable law," and in § 3518(e), which provides that the PRA shall not be interpreted as "increasing . . . the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments, agencies and offices . . . ." The legislative history emphasizes the crucial role Congress assigned to these provisions in drawing "*an important distinction between paperwork management and substantive decisions*," S. Rep. No. 930, *supra* at 43. And, contrary to petitioners, these provisions are not drained of all force by PRA § 3518(a), which provides that the authority of agencies to prescribe rules "for Federal information activities" is subject to OMB's authority under the PRA "except as otherwise provided in [the PRA]." And §§ 3504(a) and 3518(e) state what is so "otherwise provided."

In this case, OMB, in reviewing a final regulation promulgated by the Occupational Safety and Health Administration, disregarded both the specific substantive mandate of the statute pursuant to which the regulation was promulgated and OSHA's informed and expert judgment on how to apply that mandate to the issues in the rulemaking proceeding.

In the first regard, OMB ignored § 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), which requires OSHA, in regulating employee exposure to hazardous substances presenting significant risks, to promulgate the most protective standard feasible, without engaging in a balancing of costs and benefits. *See American Textile Mfrs. Inst.*

v. Donovan, 452 U.S. 490, 509 (1981). OMB disregarded as well § 6(b)(7), 29 U.S.C. § 655(b)(7), which requires OSHA to prescribe the use of such warnings as are necessary "to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appropriate emergency treatment, and *proper conditions and precautions of safe use or exposure*" (emphasis added). OMB thus failed to act in accordance with "applicable law" (PRA § 3504(a)).

In the second regard, OMB did not honor OSHA's judgment as to what the mandate of the OSH Act requires in the case of the Hazard Communication Standard. Instead, OMB, with hardly a backward glance, usurped OSHA's role as the regulator of the employer obligation to protect employee safety and health, by countermanding OSHA's determinations as to what the OSH Act requires here. In so doing, OMB crossed the line drawn in the PRA "between paperwork management and substantive decisions," S. Rep. No. 930, *supra* at 43, and improperly asserted precisely the "authority . . . with respect to the substantive policies and programs of [OSHA]" that § 3518(e) withholds.

ARGUMENT

I. THE REVIEW PROVISIONS OF THE PRA APPLY ONLY TO INFORMATION REQUIRED TO BE PREPARED FOR THE GOVERNMENT'S USE

Section 6(b)(5) of the Occupational Safety and Health Act directs the Occupational Safety and Health Administration to promulgate standards for hazardous substances that are designed to

> most adequately assure[ ], to the extent feasible . . ., that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

Section 6(b)(7) in turn provides:

> Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Pursuant to the mandate of these provisions, and after conducting a lengthy rulemaking, OSHA issued the Hazard Communication Standard. In promulgating and revising that Standard OSHA determined that to protect employee safety and health as required by §§ 6(b)(5) and (7), it is necessary to place on employers the responsibilities prescribed in the Standard, including specifically the responsibilities prescribed by the three provisions the Office of Management and Budget has disapproved, *viz.*, (i) that an employer at a multi-employer worksite should be required to make material safety data sheets (MSDSs) available on site to other employers whose employees may be exposed to hazardous chemicals used by the first employer, (ii) that employers whose employees are exposed to hazardous "consumer products" should be required to make the MSDSs they receive for these products available to employees, and to provide employees with training respecting the hazards involved, unless the product in question is used in such a way that the duration and frequency of exposure is not greater than that experienced by consumers, and (iii) that employers whose employees are exposed to hazardous drugs that are not in solid, final form should be required to make available the MSDS's they receive for these drugs, and to provide employees with training respecting the hazards involved.

The question presented is whether these three provisions of the Standard are subject to review by the OMB under the Paperwork Reduction Act.

A. As the OSHA standard at issue here illustrates, the logic of the process by which the Government elaborates the law generates a basic distinction between two classes of Government actions requiring private parties to prepare and disseminate information.

In the first, and by far the larger, class, such Government requirements are *means to a further end*: the information is sought for the Government's evaluation and use in determining what substantive policies the Government should follow, what substantive legal rules governing the conduct of private parties the Government should issue, and what law enforcement steps the Government should take.

This Government decisionmaking process,in turn, may generate a class of Government actions requiring private parties to prepare and disseminate information *to other private parties*: Government actions in which the provision of information is *the substantive end of the regulatory process in and of itself*. One option in regulating the conduct of private parties which may prove superior to, *e.g.*, directing a party on how to accomplish a particular task, is to condition that party's right to act on providing information to third parties who will be affected. That is the office of the three provisions of the HCS at issue here; indeed, two of these provisions require only that the covered employers *disseminate* information prepared by others and are thus information requirements in only the most attenuated sense.[11]

In certain situations such a substantive rule will offer the best combinations of flexibility and fairness open to the rulemaker. Automobile brake lights and turn signals, theater fire exit signs and medicine warning labels come readily to mind as familiar examples.[12]

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[11] Other aspects of the standard, not relevant here and not disapproved by OMB, provide, in addition, that certain materials be maintained for OSHA's inspection.

[12] As is true in most means/ends analyses, there are the polar extremes in which the distinction is clear and borderline cases in which the distinction blurs: In the situation at hand the Government may obtain and evaluate information and also make that in-

The distinction between these different classes of information requirements is not simply a theoretical one; it is a distinction which goes to the practicalities of the issues presented here. A rational evaluation of the necessity of the first class of information requirement turns on entirely different considerations than an evaluation of the second class.

The question of the necessity of securing information used in Government decisionmaking turns on the costs and benefits of obtaining more information in understanding a particular problem and in arriving at a sound response to that problem.

The question of the necessity of requiring a private party to provide information to another private party, on the other hand, turns on the costs and benefits of providing the information versus the costs and benefits of competing regulatory options, as well as on the costs and benefits to the third party of more information versus less.

The second calculus is, of course, far more complex than the first and, of equal importance, far more likely to turn on the precise terms of an underlying substantive statute.

B. With this background in mind we now turn to the Paperwork Reduction Act's language and structure. These primary materials teach two lessons:

First, the PRA goes quite far in empowering OMB to review information requirements of the first kind just described, *viz.*, directives to private parties to make information available to the Government for the Government's use.

Second, there is not a single indication that the PRA goes the next step and empowers OMB to review informa-

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formation available to third parties for their protection. (We treat this borderline case *infra* at pp. 30-33.) The fact that there are such borderlines does not, of course, destroy the utility of the underlying dichotomy.

tion requirements of the second kind, *viz.*, substantive directives to private parties to make information available to other private parties for the latter's own use.

1. As relevant here, the PRA's purposes are:

> (1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
>
> (2) to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information;
>
> (3) to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;
>
> • • • •
>
> (6) to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality. . . . [44 U.S.C. § 3501(1), (2), (3) & (6).] [13]

In pursuit of those purposes, the PRA directs Federal agencies:

> (a) not [to] conduct or sponsor the collection of information [14] unless, in advance of the adoption or

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[13] Section 3501 identifies two other statutory purposes, which reflect the fact that in addition to its role in reviewing agency collections of information, OMB has other responsibilities under the PRA with respect to managing federal information activities. Thus, one purpose of the Act is "to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices," § 3501(4), and another is "to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves thhe quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to and for the Federal Government," § 3501(5).

[14] The Senate Report explains the meaning of the phrase "conduct or sponsor" as follows:

revision of the request for collection of such information—

> (1) the agency has taken actions, including consultation with the Director [of OMB] to—
>
> (A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;
>
> (B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and
>
> C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;
>
> (2) the agency . . . has submitted to the Director the proposed information collection request • • •;
>
> (3) the Director has approved the proposed information collection request, • • • [and] • • •
>
> (f) [The] agency . . . has obtain[ed] from the Director a control number to be displayed upon the information collection request. [44 U.S.C. § 3507.]

Collections of information are only considered to be conducted or "sponsored" by a Federal agency and subject to the requirements of the Act if:

(i) the agency itself conducts the collection;

(ii) the agency uses a procurement contract to obtain information by way of a contractor; or

(iii) the terms and conditions of a grant or cooperative agreement specifically require that collections of information by a recipient from the public be subject to the clearance requirements of the Act. [S. Rep. No. 930, 96th Cong., 2d. Sess. 25 (1980).]

See also 126 Cong. Rec. 30191 (1980) (remarks of Senator Danforth).

The Director of OMB, in "reviewing and approving information collection requests proposed by agencies," is, in turn, authorized to

> determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency. [44 U.S.C. § 3504(c); *see also* 44 U.S.C. § 3508.]

Five defined terms are used in setting out the foregoing agency obligations and OMB authority, and to have the complete legislative picture we set out those definitions at this juncture:

> The term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency [44 U.S.C. § 3502(3)];
>
> The term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods • • • [44 U.S.C. § 3502(4)];
>
> The term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information [44 U.S.C. § 3502(11)];
>
> The term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion [44 U.S.C. § 3502(16)]; and
>
> The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records [44 U.S.C. § 3502(17)].

Although for the most part the PRA's legislative history does not elaborate on these definitions, one definitional term—"practical utility"—was discussed at some length. The Senate Report states: "The term 'practical utility' means the ability of an agency to actually use as opposed to potentially use the information it collects. An agency may determine it needs information it does not have the capability to use for the purpose intended. Such information would not have practical utility." S. Rep. No. 930, 96th Cong., 2d Sess. 39 (1980) (hereinafter "Senate Report"). The House Report similarly states: "'[P]ractical utility' [refers to] the ability of an agency to use information it receives. . . . Too often, agencies will collect reams of data on the basis of need only to store the data unused." H.R. Rep. No. 835, 96th Cong., 2d Sess. 22 (1980) (hereinafter "House Report").[15]

2. The foregoing is instinct with the understanding that the sole subject covered by the PRA is Federal agency directives to private parties to provide information *to the agency for the agency's use.* Let us enumerate:

First, the section setting forth the statutory purposes is concerned with (i) minimizing the paperwork "burden" on private parties, which burden, as we have seen, is defined as "the time, effort, or financial resources expended by persons to provide information *to a Federal agency*"; (ii) minimizing "the cost *to the Federal Government* of collecting, maintaining, using and disseminating information," costs which plainly are associated with information the Government has sought for its own use; and (iii) "maximiz[ing] the usefulness of information collected, maintained, and disseminated *by the Federal Government*," which, again, can only be read as a reference to information the Government has sought for its own use.

[15] See also 126 Cong. Rec. 30190 (1980) (statement of Sen. Danforth) ("practical utility" turns on whether an agency can "demonstrate its capability to use the information once it gets it").

Second, the agency actions required as a condition of making an information collection request demonstrate a congressional intent to regulate information sought for the Government's own use: the agency is to eliminate "information collections which seek to obtain information available from another source within the Federal Government"; the agency is to reduce the burden on "persons who will provide information *to the agency*"; and the agency is to formulate plans for "tabulating" the information sought, again a locution that only covers information provided to the Government.

Third, the Director of OMB in determining whether the information request proposed by an agency is necessary is given one specific guideline, "to determine whether the information will have practical utility"; and practical utility, as we have seen, means "the ability of an agency *to use information it collects, particularly the capability to process such information in a timely and useful fashion.*'" *See also* the legislative history elaborating on that definition, *supra* at p. 23.

Finally, if OMB disapproves an agency's proposed collection of information, the consequence is that the agency's information collection request will not have a "control number" issued by OMB; and in the absence of such a control number, "no person shall be subject to any penalty for failing to maintain or provide information *to any agency*. . . ." 44 U.S.C. § 3512.

3. The PRA's legislative history confirms that the sole question Congress confronted and answered is how to control Government requests to private parties to provide information to the Government for the Government's use.

In the Senate Hearings on the bill, OMB's representative described the scope of the issue addressed by the legislation in the following terms:

> Few other topics evoke more public outcry than the amount of time and money the American people expend each year providing or maintaining information *for Federal Departments and agencies.*
>
> • • • •
>
> No one questions the basic *need of the government for information to plan, make policy decisions, operate and evaluate programs, and perform necessary research.* The question is rather how much information is essential. [*Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 40-41 (1979) ("Senate Hearings") (testimony of Wayne G. Granquist, Associate Director for Management and Regulatory Policy, OMB) (emphasis added).]

The Senate Report describes the "basic mission" of the Office of Information and Regulatory Affairs—the office within OMB that is charged with administering the PRA—as "to reduce and minimize the public burden involved in providing information *to the Federal Government.*" Senate Report at 8 (emphasis added). *See also id.* at 11 ("[T]he essential purpose of the legislation" is "to reduce the burden on the public in providing information *to the Federal Government.*") (emphasis added). The House Report explains that the PRA resulted from "a growing concern that the way *the Government collects, uses and disseminates* information must be improved." House Report at 3 (emphasis added). *See also id.* at 9 ("[t]he OMB Director is to ensure that the agencies, in developing rules and regulations, use efficient methods to collect, use, and disseminate the necessary information)."

So too, every example of a Federal paperwork requirement that is offered in the legislative history consists of a requirement that information be provided to the Government for the Government's use. Thus, the Senate

Report gives as examples of "Federal paperwork requirements" the following: "tax forms, medicare forms, financial loans, job applications, or compliance reports;" forms that a small business person must file to start or expand a business; forms that doctors and hospitals must file to obtain Medicare reimbursement; and forms needed to apply for Federal grant funds. Senate Report at 3-4. The examples of Federal paperwork requirements given by OMB's representative in the Senate Hearings likewise all consist of requirements to provide information to the Government. *See* Senate Hearings at 40, 46-55.

Of at least equal importance, we have *not* found a single statement in the entire legislative history of the PRA, including the hearings, reports and debates, that suggests that the statute would apply to anything other than requirements for information to be provided *to the Government for the Government's use.* Nor have we found a single suggestion that the Federal Reports Act—the PRA's predecessor—applied to substantive rules requiring one private party to provide information directly to another private party for the latter's protection or that the PRA would, or should, apply to this very different class of information requirements. Nor does petitioners' brief cite or quite any such stateemnt. This silence is pregnant with significance.

In all the foregoing ways the legislative materials show that Congress only went so far in the PRA as to authorize OMB to review Federal agency efforts to require that information be provided to the agency for the agency's own use.

C. Petitioners argue that PRA §§ 3502(4) and (11), which define the terms "collection of information" and "information collection request," respectively, indicate an intent to go beyond information provided to the Government for the Government's own use. *See* Pet. Br. at 20-21. That suggestion is without merit for two reasons.

1. The definitions upon which petitioners place such reliance are framed in a way that does not provide a

direct answer to the question presented here. The term "collection of information" is defined in § 3502(4) as (i) "the obtaining or soliciting of facts or opinions *by an agency*" (emphasis added), (ii) "through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods." Neither half of that definition furthers petitioners' position.

The first half is far more in line with our reading of the PRA than with petitioners' reading. The sense of the words is that it is facts or opinions an agency wishes for its own use that is covered; the main point is that the agency seeks to "obtain" facts or opinions. Petitioners emphasize the inclusion of the words "or soliciting," *see* Pet. Br. at 24, but that term does not show that the PRA covers situations where information is required for a private party rather than for a Federal agency. To "solicit" is "to endeavor to obtain. . ." *Webster's Third New International Dictionary* 2169 (1986). Thus § 3502(4) fairly read in a natural way provides that there is a collection of information within the meaning of the PRA if an agency obtains or "endeavors to obtain" facts or opinions.[16]

The second half of § 3502(4) consists of nothing more than an enumeration of the ways in which the Government customarily demands information for its own use. Petitioners focus on the inclusion of "reporting or recordkeeping requirements," citing a passage in the Senate Report which states that that phrase refers to "informa-

[16] In this regard § 3502(4) is similar to statutes providing that a person may not "solicit or receive" particular information. *See, e.g.*, Shipping Act of 1984, 46 App. U.S.C. §§ 819, 1709(b)(14); Interstate Commerce Act, 49 U.S.C. § 11910(a)(1); Act of Jan. 12, 1983, 49 U.S.C. § 523(a); Ethics in Government Act of 1978, 5 App. U.S.C. § 202(f)(6)(B), 2 U.S.C. § 702(e)(6)(B). In none of those statutes is the word "solicit" used to refer to anything other than the first stage in the process of "obtaining" or "receiving" information.

tion maintained by persons which may be but is not necessarily provided to a Federal Agency." Senate Report at 40, cited in P. Br. at 43. That Report passage read in its context simply demonstrates an intent to cover the many statutes and regulations that require that information be prepared *for* the Government's use, but which do not require the information to be provided *to* the Government except upon *request*.[17] As the Senate Report puts it, such recordkeeping requirements involve information "maintained by [*sic*; 'to']," albeit not "*directly* provided [to]," a Federal agency. Senate Report at 38 (emphasis added). That this was the draftsman's intent is reflected in PRA § 3512, which provides (albeit not in perfect syntax) that in the absence of OMB approval of an information collection request, a person cannot be penalized "for failing to "*maintain* or provide *information to any agency*. . . ." (emphasis added).[18]

[17] The OSH Act itself contains such a provision in § 8(c)(1), 29 U.S.C. § 657(c)(1), which states that "[e]ach employer shall make, keep and preserve, and make available to the Secretary . . . such records . . . as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses."

[18] *See also, Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending, No. 88-849 (where records must be kept so as to be "available for use" *by an agency*, "physical delivery to [the] agency is not essential to the notion of 'collection of information,'" 846 F.2d at 1454, quoted in Pet. Br. at 29).

The norm is that such requirements for "reporting" and/or "record-keeping." as those terms are used in a legion of statutes, refer to the making of reports or the keeping of records for the Government's use. *See, e.g.*, Food, Drug, and Cosmetic Act, 21 U.S.C. § 357(g); Communications Act of 1934, 47 U.S.C. § 219; Interstate Commerce Act, 49 U.S.C. §§ 11144, 11145; Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2217; Controlled Substances Act, 21 U.S.C. § 827; Job Training Partnership Act,

Thus, the definition of "collection of information" in PRA § 3502(4), even standing alone, does *not* evidence an intent to go beyond information that is collected by the Government for the Government's own use. And the definition of "information collection request" sheds no further light on the subject: an "information collection request" is simply a particular requirement "calling for the collection of information." § 3502(11).

2. In all events, these definitions do *not* stand alone. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), in turn quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122 (1849)). *See also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S. Ct. 1811, 1817 (1988). And, as we have shown, the statutory language and the statutory scheme considered as a whole plainly contemplates that OMB's review function is limited to information that is provided to an agency for the agency's own use.

D. Petitioners make much of statements in the PRA hearings and Committee Reports disapproving the Securities Exchange Commission's claim that under the PRA's predecessor—the Federal Reports Act—information requests were subject to clearance "only [in] situations where answers provided by respondents are to be used for statistical compilations of general public interest." Senate Report at 13. *See also* House Report at 23. On that ground, the SEC had refused to allow review of any of

29 U.S.C. § 1575; Federal Deposit Insurance Act, 12 U.S.C. § 1892(b); Horse Protection Act of 1970, 15 U.S.C. § 1823(d), (e); Egg Research and Consumer Information Act, 7 U.S.C. § 2706(c); Solid Waste Disposal Act, 42 U.S.C. § 6992b(c); Intergovernmental Personnel Act of 1970, 42 U.S.C. §§ 4764, 4765. There is nothing to suggest that the PRA uses the terms in any broader sense.

its "disclosure- or enforcement-related information gathering." House Report at 23. And the SEC argued that the PRA should be limited to such statistical information. *See* P. Br. at 38-45. The Congressional discussion of the SEC's contentions does not advance petitioners' position.

The Senate Report states that "documents *filed with*" the SEC should be subject to paperwork review even if the documents are collected by the Agency "to *form the basis for* disclosure to the public." Senate Report at 39 (emphasis added). The Report goes on to state that in determining whether such information will have "practical utility," OMB "should consider, among other things, *whether the agency can use the information* either to carry out its regulatory or other functions or *to make it available* to the public for the use of [investors and others]." *Id.* at 39-40 (emphasis added).[19]

Given the PRA's purposes it is neither surprising nor revealing that the position advanced by the SEC—*viz.*, that independent agencies, unlike other agencies, should be allowed to require the public to submit information to *the agencies* with no OMB review except where the information is used for statistical compilations—was "viewed . . . skeptically." P. Br. at 42. Nor is Congress' resolution of the issue posed by the SEC—to make the PRA applicable to all information provided to any Federal agency *for the agency's use*, whether the agency's purpose in requiring the information is to make statistical compilations, to develop policy, to determine com-

[19] SEC Commissioner John R. Evans had explained in the hearings that "information collection by" the SEC serves "many different purposes," one of which is that "information is collected that forms a basis for disclosure to the public." Senate Hearings at 66-67. Thus, while the information is ultimately "intended for use of the investing public," it is "collect[ed by]" the SEC in the form of "filings pursuant to the Federal securities laws." *Id.* at 67. *See also Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 330 (1980) ("House Hearings") (testimony of SEC Chairman Harold M. Williams).

pliance, or to review the information for the purpose of making it available to the public—surprising or revealing. Any other resolution would have required the drawing of lines more nice than obvious. In particular, information provided to any agency for its own enforcement purpose and for disclosure to the public is at the borderline between—perhaps more accurately is on both sides of —the line between the two general classes of information requirements that we described at the outset of our argument. *See supra* at pp. 18-20. Faced with the choice between including some such information demands within the PRA or all such information demands Congress chose the latter course.[20]

But the essence of the matter is this: the entire debate takes place in the context of documents required to be "filed with" an agency and there is no suggestion that documents prepared solely for the use of private parties, and not "filed with" an agency were intended to be covered. In words of one syllable, the only problem that was presented to Congress for resolution in the PRA was that of the Government's burgeoning demands for information to be provided to the Government for the *Government's own use;* and the provisions Congress enacted grant OMB authority to address only that problem,

[20] That choice had much to commend it. First, when an agency demands information for its own use, the agency's institutional interests are often involved (including budgetary considerations, which may make it appealing to the agency to demand that the public gather information the agency would otherwise have to gather on its own), and OMB oversight may reasonably be thought to be a particularly useful counterweight. Second, the danger of OMB interference with regulatory policy, which Congress sought to minimize, *see* Part II *infra*, is greatest where an agency does not require that information be provided to the agency for its own use, but requires instead that information be provided directly to the public for its use pursuant to a substantive rule. Third, although the broad definition of "collection of information" in the PRA is easy enough to apply in its proper context (that of information provided to the Government for its use), if applied outside that context it expands beyond any sensible bounds, to encompass fire danger signs, traffic signals and so on.

see supra at pp. 24-30. Nothing in Congress' response to the issue raised by the SEC suggests that the PRA has any broader reach.[21]

E. All else failing, OMB falls back on its own regulations and pleads for deference to the Office's own view of its own regulatory authority. The OMB regulation relied on provides that the Office has the authority to

[21] Petitioners quote a statement by Senator Chiles in the hearings to the effect that the SEC should be treated the same as EPA and OSHA. *See* P. Br. at 42, citing Senate Hearings at 85. That statement provides no basis for inferring that Senator Chiles (let alone Congress as a body) thought that OMB had any role to play in reviewing substantive OSHA standards such as the yet-to-be-promulgated HCS. The only OSHA information activities mentioned anywhere in the legislative history are *reporting* requirements, not substantive standards. Specifically, in the hearings OMB praised OSHA for its then-recent and well-publicized decision to exempt small employers from OSHA's general reporting requirements; a decision which "eliminated 40,000 American businesses from OSHA forms" and was characterized by OMB as a significant step in "reducing the frequency with which information is *sent to the Government.*" House Hearings at 104-105 (emphasis added) (testimony of Wayne G. Granquist, OMB).

Former Senator Chiles has submitted a brief *amicus curiae* in which he quotes (at pp. 18-19) a statement he made on the Senate Floor when the PRA was reauthorized in 1986. Even if the statement in question had referred specifically to substantive public information requirements such as those at issue here—and the statement does not—this pronouncement by a single Senator, which was not the subject of any legislative action taken by Congress at the time, would be entitled to no weight in construing the 1980 PRA. *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). Nor is there any significance, as Senator Chiles suggests in his brief at 19, n.5, to the fact that a subsequent Congress declined the invitation of respondent Public Citizen "to make . . . absolutely clear, once and for all," that the PRA does not apply generally to disclosures to the public. Particularly given that Public Citizen was only asking Congress to clarify what the witness asserted the 1980 Act already meant, the fact that Congress did not act on that request does not suggest that the Congress to which the request was made—to say nothing of the earlier Congress that enacted the legislation—disagreed with the interpretation Public Citizen espoused.

review federally mandated "posting, notification, labeling, or similar disclosure requirements" addressed directly to the public and not filed with the Government. 5 C.F.R. § 1320.7(c)(2).[22] That regulation is not entitled to any deference.

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[22] It is not clear, however, that the regulations, even if accepted on their own terms, would lead to the conclusion that all of the provisions of the Hazard Communication Standard that were disapproved by OMB constitute "collection of information." The regulations state that "[t]he public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within th[e] definition [of 'collection of information']." 5 C.F.R. § 1320.7(c)(2). The preamble to the regulations offers as an example the federal requirement that warning labels be placed on cigarette packages. "Although the label is a federally-mandated disclosure, no collection of information is involved, since the persons subject to the requirement need only transmit to the public information supplied by the federal government." 48 Fed. Reg. 13675 (1983).

While the regulation and the example discussed refer to information provided by the Federal government, OMB has made clear that the identity of the source of the information is not critical: the crucial distinction is whether the party making the disclosure is provided with the information, or must develop the information itself. Thus, OMB explained that the proviso in § 1320.7(c)(2) was added "to make clear that disclosure and labeling requirements are covered only to the extent that they implicitly or explicitly require a person to collect information for the purpose of the disclosure or labeling." 48 Fed. Reg. 13675 (1983).

Given this distinction, if the transmittal of warnings provided by the Government is not a "collection of information," then neither is the transmittal from an employer to his employees (or to other employers) of MSDSs received from a chemical manufacturer.

Even apart from the consideration just discussed, there are additional reasons why the provisions of the HCS that were disapproved by OMB do not constitute "collection of information" within the meaning of PRA § 3502(4). For example, petitioners strain to assert that the *training* requirements of the Standard, which were disapproved as applied to certain drugs and consumer products, are "reporting requirements." Pet. Br. at 22. To "report," however, is not simply to provide information, but to provide an "account;" that is, to relate information "*as* the result of" a

1. The determination whether there has been a "legislative delegation to an agency [to resolve] a particular question," *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) depends on "th[e] particular context [involved]," *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 670 (1985). Simply put, the context here is whether OMB—in claiming authority to review substantive requirements that information be provided directly to private parties for their use—has undertaken "a movement into a *new area of regulation which Congress had not committed to it.*" *Labor Board v. Insurance Agents*, 361 U.S. 477, 499 (1960) (emphasis added).

As the Court recognized in *Insurance Agents*, in this context the determination of the agency's statutory authority is uniquely one for the courts: "[W]here Congress has given [an agency] a question to answer, the courts will give respect to that answer; but they must *be sure the question has been asked.*" *Id.* (emphasis added).[23] *See also, Addison v. Holly Hill Fruit Products*

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search or inquiry. *See Webster's Third New International Dictionary* 1925 (1986) (emphasis added). An employer who provides hazard training to employees is not "reporting" to them.

Similarly, in arguing that a required exchange of MSDSs on multi-employer worksites is a "recordkeeping requirement," Pet. Br. at 23 n.11, petitioners assume, among other things, that an MSDS is a "record" within the meaning of §§ 3502(4) & (17). But the term "record" does not necessarily encompass any and every kind of document; the term is frequently used to connote a particular kind of document—one made to *preserve evidence that some act or event occurred. See Webster's Third New International Dictionary* 1898 (1986). This is the most natural meaning of the term as it is used in the phrase "recordkeeping requirements;" and an MSDS is not a "record" as so defined.

[23] *See, e.g., Ford Motor Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980) (analyzing in detail the statutory language and legislative history respecting the extent to which interpretive authority had been delegated to a particular agency, in order to determine the deference owed the agency's interpretation); *Process Gas Consumers Group v. United States Department of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) ("The extent to which

Co., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power. That is a judicial function.")[24]

The issue here, in other words, is qualitatively different from that considered in such cases as *Chevron U.S.A. v. National Res. Def. Council, supra.* In *Chevron* the issue concerned the deference to be shown to agency "rules to fill any gap left [in a congressionally created program], implicitly or explicitly, by Congress" and to agency "accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 843, 845 (internal quotations omitted). Here the issue is

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courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue'") (quoting *Constance v. Secretary of Health and Human Services*, 672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)).

[24] It is therefore not surprising that this Court has repeatedly found it appropriate to determine, on a *de novo* basis, the meaning of substantive statutory terms that affect the basic scope of an agency's delegated authority. *See, e.g., Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (Federal Reserve Board overstepped its authority when it extended its regulations to "non-bank banks"); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion) (rejecting Secretary of Labor's interpretation of substantive provisions in the Occupational Safety and Health Act, because "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (Court required to decide whether Secretary properly construed his authority); *Packard Co. v. Labor Board*, 330 U.S. 485, 493 (1947) (Court made *de novo* inquiry into meaning of statute, stating "[w]e are not at liberty to be governed by . . . policy considerations in deciding the naked question whether the Board is now . . . acting within the terms of the statute").

whether the OMB rule addresses a subject *outside* the limits of the program Congress created in the PRA and whether OMB is proposing an accommodation of policies that were *not* committed to the office's care by the PRA. Plainly these latter issues are ones for judicial not for agency resolution.[25]

2. The statutory language and legislative history of the PRA, moreover, show that the last thing in Congress' mind was to delegate to OMB the function of determining the limits of the Office's own authority over other Federal agencies.

The statute provides that OMB's role in promulgating regulations is to "promulgate rules, regulations, or procedures necessary to exercise *the authority provided by this chapter.*" 44 U.S.C. § 3516 (emphasis added). Thus, OMB is not charged with *defining* "the authority provided by this chapter;" to the contrary, OMB's "rules, regulations or procedures" are authorized only to the extent that they are necessary to exercise what is *in fact* "the authority provided by this chapter."

As we discuss more fully *infra* at pp. 39-40, Congress was acutely aware of OMB's penchant for aggrandizing its power at the expense of other agencies, and Congress was mindful of the need to check that propensity. Thus, PRA § 3518(e), which provides that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments,

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[25] *See e.g. K Mart Corp. v. Cartier, Inc., supra*, 108 S. Ct. at 1817 (administrative interpretation not entitled to deference, even within a sphere where deference would otherwise be owed, if the intent of Congress is clear). For a more general treatment, in a related context, of the subject of deference to administrative interpretations, *see* the Brief for the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Neither Party in *Michigan Citizens for an Independent Press, et al. v. Richard Thornburgh, et al.*, No. 88-1640.

agencies and offices . . .," was adopted out of "concern that the authority in this Act might be used to increase the power of OMB over substantive policy." Senate Report at 56. The Senate Report further states:

> The Committee notes that there have been problems along that line in the past. It has been argued that the Federal Reports Act—which S.1411 amends—was used to interfere with regulatory policy under the guise of clearing information requests.
>
> • • • •
>
> The bill has provisions to guard against that. [*Id.*]

To paraphrase Professor Sunstein's pithy characterization of the basic reason why agencies should not generally be free to define the scope of their own powers, Congress, knowing OMB's tendency to play the "fox" determined not to leave OMB in sole charge of "guard-[ing] the henhouse." *See Judicial Review of Administrative Action in a Conservative Era*, 30 Admin. L. Rev. 353, 368 (1987) (remarks of Professor Cass Sunstein in panel discussion).

Particularly against this background, the delegation contained in § 3516 should be construed in accordance with its plain meaning: OMB has *no* authority to define the extent of its authority, but only to adopt rules and procedures to exercise the authority Congress in fact intended to confer.

In sum, Congress' intent in the PRA was to authorize OMB to review Federal agency requirements that information be provided to the agency for the agency's own use; the PRA does not go further and grant OMB the authority to review substantive regulatory rules such as those here that require one private party to provide information to another private party for the latter's protection. OMB's attempt to expand its authority beyond the area covered by the PRA must be rejected.

II. EVEN IF THE PROVISIONS AT ISSUE WERE SUBJECT TO REVIEW UNDER THE PRA, OMB EXCEEDED THE LIMITATIONS IN THAT ACT WHICH REQUIRE OMB TO ADHERE TO "APPLICABLE LAW" AND WHICH DENY OMB AUTHORITY OVER "SUBSTANTIVE POLICIES AND PROGRAMS" ENTRUSTED TO OTHER AGENCIES

In crafting the PRA, Congress took pains to ensure that OMB's authority to review an information collection request does not lead to interference with the requesting agency's substantive regulatory authority. In this case, OMB did not respect that Congressional limit on the Office's authority.

A. The PRA contains two provisions that prevent OMB from using its paperwork review authority as a lever for exercising the substantive regulatory authority Congress has entrusted to the agency requesting the information. Section 3504(a) provides that "[t]he authority of [OMB] . . . shall be exercised consistent with applicable law," and § 3518(e) provides in pertinent part that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of . . . [OMB] . . . with respect to the substantive policies and programs of departments, agencies and offices. . . ."

The PRA legislative history emphasizes the importance Congress placed on these provisions as a means of keeping OMB within proper bounds. The Senate Report, as already noted, states "that there ha[d] been problems . . . in the past" with OMB's performance under the Federal Reports Act, including, most particularly, that OMB's review activities "w[ere] used to interfere with regulatory police under the guise of clearing information requests." Senate Report at 56. The Report goes on to state:

> The [PRA] bill has provisions to guard against that. Section 3518(e) provides that the bill does not affect in any way the powers of the President or OMB respecting the substance of agency policies. Thus S.1411 draws *an important distinction between*

> *paperwork management and substantive decisions.* [*Id.* (emphasis added)].

Similarly, in discussing the review procedures established in § 3504(h) of the Act, the Senate Report "emphasi[zes] that the Director of OMB's authority must conform with the provisions of Sections 3504(a) and 3518(e)." *Id.* at 43.[26]

Despite all this, petitioners maintain that these provisions add nothing to the PRA regarding how OMB is to review information collection requests and were intended simply to express the tautology that OMB's authority "extends *only* to the review of information collection requests, and no further." Pet. Br. at 34 (emphasis in original). That reading of the PRA is untenable.

As a practical matter petitioners suggestion read PRA §§ 3504(a) and 3518(e) out of the Act. That suggestion, moreover, cannot be squared with Congress' admonition that OMB not lose sight of the "important distinction between paperwork management and substantive decisions." Senate Report at 56.

Petitioners argue, too, that §§ 3504(a) and 3518(e) are drained of all force by § 3518(a), which provides that:

> Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director [of OMB] by this chapter.

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[26] *See also* 126 Cong. Rec. 30178 (1980) (Senator Chiles) ("S. 1411 was designed to insure that all agencies can vigorously enforce their substantive mandates from the Congress. Section 3518 specifically states that this bill does not change existing relations of the President and OMB with respect to the substance of agency programs.")

But § 3518(a) states that agency rules and procedures for information activities are subject to the authority conferred on OMB by the PRA "[*e*]*xcept as otherwise provided in* [*the PRA*]." It is therefore necessary to refer to other provisions of the PRA, including §§ 3504 (a) and 3518(e), to see what is "otherwise provided." And, in § 3504(a), it is "otherwise provided" that OMB must act in accordance with applicable law, and in § 3518(e) it is "otherwise provided" that the PRA does not increase OMB's authority with respect to "substantive policies and programs [of other agencies]."

Accordingly, § 3518(a), by its terms, means no more than that an agency's information activities are subject to OMB's authority under the PRA *so long as OMB acts in accordance with the applicable substantive law governing the requesting agency and OMB does not seek to extend its authroity so as to exercise the requesting agency's authority to make substantive policy determinations.* To harmonize § 3504(a), 3518(a) and 3518(e) in this way is to give full force to the plain meaning of each provision, and to honor "the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Inst. v. Donovan*, 425 U.S. 490, 513 (1981) (plurality opinion); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973).

We hasten to add that the approach just outlined has a limited application. Most Federal agency information collection requests seek information for use in formulating policy or in determining compliance. Although such requests are an important aspect of the policymaking and rulemaking processes,[27] as we noted at the outset, those

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[27] *See* House Report at 22: "Information gathering is essential for formulating policy as well as for managing regulatory programs. Determinations of compliance with regulation often are made on the basis of information collections." The House Committee in acknowledging the relationship between "policymaking and information management," and in acknowledging that the two cannot always be separated, *see* Pet. Br. at 44, was focusing on such uses of information. *See* House Report at 22-23. *See also* House

processes are rarely subject to specific statutory directives mandating that decisionmaking be performed in any particular way on the basis of any particular body of information.[28] Thus, while an agency may strongly believe that certain information is useful as a guide to formulating policy or assessing compliance it will rarely be the case that OMB's disagreement with the agency concerning such a matter involves a potential conflict with a specific statutory mandate.

But where, as in this case, OMB seeks in a paperwork review to pass judgment on the manner in which an agency has *directly regulated the conduct of those the agency is charged with regulating*, there is a clear danger that OMB will act inconsistently with "applicable law" (§ 3504(a)), and will attempt to assert "authority . . . with respect to the substantive policies and programs [of the agency]" (§ 3518(e)). And, as we now show, that danger eventuated here.

B. It is not necessary in this case to define the precise point at which "paperwork management" becomes "substantive decision[making]" nor is it necessary to enumerate every respect in which an OMB disapproval of an information collection request might be "contrary to applicable law." For here it is plain that OMB has strayed deep into the substantive area entrusted to another agency's

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Hearings at 319 (letter of Robert R. Bruce, General Counsel, FCC) ("[I]t is not possible to separate information management from substantive agency policymaking. Information gathering is essential to formulating policy, and a principal means of enforcing regulation is to verify compliance through information collection."); Senate Hearings at 81-82 (testimony of Tyrone Brown, Commissioner, FCC) (OMB review of logkeeping requirements by which FCC "monitor[s] compliance" with broadcast rules "could have the effect of frustrating the adoption or implementation of [agency] policies").

[28] For example, § 8(c) of the OSH Act, 29 U.S.C. § 657(c), simply authorizes OSHA to prescribe such reporting and recordkeeping requirements "as necessary or appropriate for the enforcement of this chapter. . . ."

care and has acted in a manner contrary to the applicable substantive law.

OMB, in reviewing a final regulation promulgated by the requesting agency, disregarded both the specific substantive mandate of the statute pursuant to which the regulation was promulgated and the agency's informed and expert judgment on how to apply that mandate to the issues in the rulemaking proceeding. In the first regard OMB failed to act in accordance with applicable law (§ 3504(a)), and in the second OMB failed to defer to the requesting agency's authority over the "substantive policies and programs" entrusted to that agency's administration (§ 3518(e)).[29]

1. The OSH Act specifies in no uncertain terms the manner in which OSHA is to resolve the tension between costs and employee protection in fashioning standards regarding toxic materials and harmful physical agents, and, in particular, in fashioning hazard communication requirements.

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[29] Petitioners create out of whole cloth the notion that under these provisions OMB has *carte blanche* to overturn whatever "information collection *methods*" a regulatory agency may adopt, Pet. Br. at 35 (emphasis added), thus leaving a regulatory agency with only the "authority to determine, in accordance with its statutory mandate, its regulatory *objectives*," *id.* (emphasis added). More than petitioners' *ipse dixit* is required to establish the unlikely proposition that when Congress referred to "applicable law" and "substantive policies and programs," the Legislature was referring only to regulatory "objectives," and not regulatory "methods."

In particular, the phrase "policies *and programs*" is most naturally read to include both "objectives" *and* "methods." Nor does petitioners' proffered distinction have any operational content. In this case, OMB disapproved provisions that OSHA believed (and continues to believe) are essential for the protection of worker health and safety. *See supra* at pp. 6-8, 10-12. The debate as to whether this was a disagreement as to "objectives" or "methods" is totally devoid of substance. But if it were necessary to pursue the point, we think it clear that OMB did *not* honor OSHA's objective, prescribed by the OSHA Act, of protecting employees from significant health risks to the greatest extent feasible. *See infra* at pp. 44-46.

As this Court held in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 509 (1981) ("*ATMI*"):

> [Section] 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then . . ., Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard . . . that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5) [ellipses in original].

And, insofar as hazard communication is concerned, a second provision of the OSH Act, § 6(b)(7), further requires that standards

> *shall prescribe* the use of labels or other appropriate forms of warning as are necessary to *insure* that employees are apprised of *all hazards* to which they are exposed, relevant symptoms and appropriate emergency treatment, and *proper conditions and precautions of safe use or exposure.* [emphasis added.][30]

In promulgating the provisions at issue here, OSHA found the Standard to be feasible, *see* 52 Fed. Reg. 31855-58 (1987),[31] and the Agency explained why each provision is necessary to reduce significant risks to worker health. *See* 52 Fed. Reg. 31865 (App. 47) (multi-employer worksite provision is "vital to ensure proper protection of employees"); 52 Fed. Reg. 31863 (App. 45) (only finished drugs in solid form were exempted from the HCS because only employees handling such products "would not be exposed to the chemicals involved, and would not need information other than that supplied on the container label under FDA requirements"); *id.* at 31863 (App. 45) ("A broader [consumer product] exemption than [OSHA promulgated] would not be appropriate to protect workers from occupational exposures that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed.") OSHA reiterated these points with even greater emphasis in the Federal Register notice the Agency published in response to OMB's action at issue in this case. *See supra* at pp. 10-12.

Under § 6(b)(5), as construed in *ATMI*, as well as under § 6(b)(7), these findings by OSHA amounted, as a matter of law, to a determination that the provisions at issue are dictated by the mandate of the OSH Act. *See ATMI*, 452 U.S. at 509 (if a protective provision is within the bounds of feasibility, "[a]ny standard . . . that strikes a different balance . . . would be inconsistent with the command set forth in § 6(b)(5)"); *Building and Construction Trades Department v. Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988) ("[I]f in fact a [particular provision] would further reduce a significant health risk and is feasible to implement, then the OSH Act *compels* the agency to adopt it (barring alternative avenues to the same result).") (quoting *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (emphasis in original).)[32]

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[30] The final sentence of § 6(b)(7) also directs OSHA to consult on such matters with "the Secretary of Health and Human Services" (*viz.*, with the National Institute for Occupational Safety and Health, an expert scientific body created by the OSH Act within the Department of Health and Human Services, *see* 29 U.S.C. §§ 669(e), 671). The statute does *not* provide for any such consultation with OMB.

[31] An OSHA standard is feasible if it is "capable of being done." *ATMI*, 452 U.S. at 508-09.

[32] In fact, the draft Federal Register notice OSHA submitted to OMB in March 1988 characterized the broadened consumer products exception urged by OMB as "certainly inconsistent with the mandate of the OSH Act as well as the purpose and intent of the HCS." *See* Occupational Safety and Health Reporter, Current Report (BNA) (March 16, 1988), at 1558. However, when the Federal Register notice was published after OMB review, that sentence was deleted, no doubt in a further required obeisance to OMB. *Compare id.* with 53 Fed. Reg. 29835 (App. 71).

Pursuant to §§ 3504(a) and 3518(e) of the PRA, OMB was required to adhere to this mandate of the OSH Act as construed by OSHA. *See supra* at pp. 39-42. OMB did not do so.

To put it mildly, there is no indication that OMB sought to adhere to § 6(b)(5)'s mandate that standards must provide the greatest level of protection that is "capable of being done," *ATMI*, *supra*, 452 U.S. at 509, or the mandate of § 6(b)(7) that hazard communication mechanisms must "insure" that employees are apprised of "all hazards" and of "proper conditions and precautions of safe use or exposure." Instead, OMB's chief preoccupation was with industry claims of burden or inconvenience, even at the mundane level of, *e.g.*, the need to obtain file cabinets, *see supra* at p. 8, and with a fetishistic desire to ensure that employers will be subject to the requirements of only one regulatory agency, even though those requirements do not purport to protect employees or to meet the OSH Act's requirements, *see supra* at p. 9.[33]

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[33] Although this point holds true with respect to OMB's disapproval of each of the three regulatory provisions at issue, it is perhaps most obvious with respect to the coverage of consumer products. OSHA's analysis of OMB's comments on this subject, together with the record evidence, establish that OMB is simply wrong in assuming that the labels prescribed by the Consumer Product Safety Commission provide the kind of information that *employees* need if the employees are to use a product safely *in industrial settings* and *at industrial levels of exposure*. *See supra* at pp. 11-12.

In particular, to use the words of § 6(b)(7) itself, CPSC labels do not provide information as to "proper conditions and precautions of safe use or exposure" in the industrial setting. OSHA's treatment of consumer products was carefully tailored to address this reality. Yet OMB ordered OSHA to exempt from the HCS every "substance packaged in the same form and concentration as a consumer product *whether or not it is used for the same purpose as the consumer product*." Pet. App. 36a (emphasis added). It

2. Even if there were any indication in its statement of reasons that OMB was mindful of its obligation under PRA § 3504(a) to comply with "applicable law" in the form of §§ 6(b)(5) & (7) of the OSH Act—and all indications are to the contrary—OMB certainly did not honor OSHA's judgment as to what the OSH Act's mandate entails.[34] Rather, without any pretense that OSHA's understanding of the OSH Act's substantive requirements is wrong as a matter of law, OMB simply countermanded OSHA's determinations on what the OSH Act requires here. In so doing OMB improperly asserted precisely the "authority . . . with respect to the substantive policies and programs of [OSHA]" that

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cannot seriously be maintained that this approach is consistent with §§ 6(b)(5) and (7).

OMB drew its proposed exemption from EPA regulations under the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499. *See* Pet. App. 36a. As OSHA explained, that makes no sense, because "SARA entails informing the general public and emergency response facilities about chemicals in their neighborhoods that could cause hazardous conditions during emergency situations[, while t]he HCS involves informing employees about the chemicals they are potentially exposed to on a day-to-day basis as a result of their work." 53 Fed. Reg. 29837 (1988) (App. 79). "As [the SARA] exemption is . . . not related to the extent of employee exposure—which is the concern of OSHA in the HCS—it is not appropriate for this rule." *Id.*

[34] *Amicus Curiae* Business Council on the Reduction of Paperwork (BCORP) praises OMB for "perceiv[ing as . . . its] role" a "balancing act" between the benefits and burdens of information production; and BCORP states that OMB performed just such a "balancing act" here. *See* BCORP Brief at 22 n.10. If that is how OMB perceives its mission—and the materials cited by BCORP, *id.*, so indicate, as does an article co-authored by a former OMB Administrator for Information and Regulatory Affairs, *see* DeMuth and Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986)—it explains where OMB has gone wrong in this case. For in the OSH Act, "Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *ATMI*, 452 U.S. at 509.

§ 3518(e) withholds. It would be difficult to imagine a clearer instance of defiance by OMB of the "important distinction" drawn by § 3518(e) "between paperwork management and substantive decisions." Senate Report, *supra* at 56.

For this reason, even if the provisions OMB disapproved were otherwise subject to review under the meaning of the PRA, OMB, by usurping OSHA's role as the regulator of the employer obligation to protect employee safety and health, exceeded the explicit limits placed on the Office's authority by the PRA.[35]

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[35] Indeed, OMB exacerbated this disregard for governing law by proceeding in a manner directly at odds with a clear command of the United States Court of Appeals for the Third Circuit, directing OSHA to complete the rulemaking here within 60 days of that court's order. Pet. App. at 4a, *citing United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987). As the Third Circuit stated, OMB's intervention, which resulted in the withdrawal of three provisions of the HCS, is "inconsistent with" that order. Thus, OMB violated the constraint imposed on the Office by PRA § 3504(a) which certainly includes a prohibition on acting in a manner "inconsistent with" validly entered court orders.

So far as we can tell, petitioners simply assume that a Federal agency that is subject to a final order directing the completion of a rulemaking by a date-certain, may rely on the PRA to disobey that order. That, however, is not, and cannot be the law. Indeed, PRA § 3504(a) itself forecloses this position.

Had petitioners wished to reserve the possibility of post-deadline amendments to the regulation resulting from OMB's review under the PRA, the appropriate time to raise that concern with the Third Circuit was when that court issued its order setting a sixty-day deadline. But petitioners did no such thing, nor did they seek this Court's review.

Thus, OMB's October 23, 1987 action disapproving the provisions of the HCS at issue is plainly inconsistent with the "applicable law" commanding that the rulemaking be completed by August 27, 1987.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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